No. 203

In the Supreme Court of the United States

OCTOBER TERM, 1954

FRANK LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 35-36) is not yet reported. The opinion of the Municipal Court of Appeals for the District of Columbia (R. 30-34) is reported at 100 A. 2d 40. The opinion of the Municipal Court for the District of Columbia appears at pp. 5-27 of the record.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was

entered June 10, 1954. The petition for a writ of certiorari was filed July 9, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner can validly withhold payment of the $50 occupational tax on wagerers imposed by 26 U.S.C. 3290 on the ground that its payment in the District of Columbia would tend to incriminate him.

2. Whether the posting requirements of the Wagering Tax Act violate petitioner's right against unreasonable search and seizure secured to him by the Fourth Amendment.

STATUTE INVOLVED

Pertinent portions of the Act of October 20, 1951, 65 Stat. 529, 26 U. S. C. 3285-3298, provide:

Chapter 27A—Wagering Taxes

Subchapter A—Tax on Wagers

§ 3285. Tax.

(a) Wagers.

There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions.

For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the busi

ness of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

* * *

(d) Persons liable for tax.

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

* * *

SUBCHAPTER B—OCCUPATIONAL TAX

§ 3290. Tax.

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

§ 3291. Registration.

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity

which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

* * *

§ 3293. Posting.

Every person liable for special tax under this subchapter shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue

§ 3294. Penalties.

(a) Failure to pay tax.

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

(b) Failure to post or exhibit stamp.

Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of $50, and the cost of prosecution. Any person who, through wilful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of $100, and the cost of prosecution.

* * *

SUBCHAPTER C—MISCELLANEOUS PROVISIONS

§ 3297. Applicability of federal and state laws.

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

STATEMENT

On October 7, 1952, an information was filed in the Municipal Court for the District of Columbia

charging petitioner under 26 U. S. C. 3294(a) with engaging in the business of accepting wagers without first paying the occupational tax of $50 required by 26 U. S. C. 3290 (R. 1-2). Petitioner's motion to dismiss (R. 4-5) was granted by the Municipal Court for the District of Columbia, which held that the Wagering Tax Act is violative of the self-incrimination provision of the Fifth Amendment and constitutes a penalty as applied in the District of Columbia. That court did not pass on an alternative contention (now urged by petitioner) that the statute violated petitioner's Fourth Amendment rights (see R. 27).

On appeal by the United States to the Municipal Court of Appeals for the District of Columbia, the order of dismissal was reversed on the ground that the issues involved had been settled by this court in *United States* v. *Kahriger*, 345 U. S. 22 (R. 30-34). On appeal by petitioner to the United States Court of Appeals for the District of Columbia Circuit, that court similarly found in a *per curiam* decision that the occupational tax is constitutional in its application to the District of Columbia, citing the *Kahriger* case, *supra* (R. 35-36).

ARGUMENT

1. Petitioner attempts to distinguish his situation from that involved in *United States* v. *Kahriger*, 345 U. S. 22, on the ground that in that case, the registration and payment of the tax would at most incriminate a person under state law, while, so he contends, in the District of Columbia regis-

tration and payment of the tax would be incriminating under federal law.

The *Kahriger* decision did not, however, turn on whether the registration would or would not be incriminating under federal law. That decision reads in part, 345 U. S. at p. 32:

> If respondent wishes to take wagers subject to excise taxes under Section 3285, *supra*, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confe to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfil certain conditions.

No one forced petitioner to engage in the wagering business. When he elected to remain in the business, he did so with full knowledge that the federal government had imposed a tax on this occupation. He could not elect to continue in the business and reject the tax burdens which Congress had placed upon it. "[T]here is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting." 8 Wigmore, *Evidence* (3rd ed.) 1940, Sec. 2259*c*.

Petitioner's elaborate argument that the $50 occupational tax is incriminating as to past activities because it applies only to persons who have

already become liable for payment of the 10% tax imposed by 26 U. S. C. 3285 and therefore have already placed at least one wager is irrelevant. The fact still remains that petitioner was informed before he ever accepted any wager that if he wished to engage in business he would have to pay both the $50 occupational and 10% tax. What he is in effect arguing is that Congress cannot tax an illegal business because payment of the tax would reveal the illegality. This Court has consistently rejected such an argument. *Sonzinsky* v. *United States*, 300 U. S. 506; *United States* v. *Sanchez*, 340 U. S. 42; *United States* v. *Constantine*, 206 U. S. 287, 293.[1]

Moreover, petitioner's premise is unsound. It is apparent from an integrated reading of the statute that the $50 occupational tax is payable prospectively and before any wager is negotiated, while the 10% tax is retrospective, and is levied on the gains of past activities. Petitioner's error arises from the fact that 26 U. S. C. 3290, *supra*, imposes the occupational tax on "each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable." This, he contends, limits liability for the occupational tax to those who are also liable to a 10% tax on some previous wagering transaction. If, however, this section is read together with its penalty provision (26 U. S. C. 3294) it is obvious

[1] This is also the substance of petitioner's argument (Pet. 18-20) that in the District of Columbia the tax is a penalty rather than a tax, and the argument falls under the weight of the above-cited decisions.

that the occupational tax liability (although imposed against the same statutory *class* of persons) is fixed as of a time antecedent to the doing of the activities for which the 10% tax is assessed, and as a condition precedent to them.[2] Paying the occupational tax, therefore, does not *ipso facto* identify one who has already engaged in wagering in the District of Columbia, but evidences at most merely a future intent to do so. It has, if anything, less criminatory implication than the act of registering

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[2] *See* 26 U.S.C. 3271 (adopted by reference in 26 U.S.C. 3292) which provides in pertinent part:

"(a) Condition precedent to doing business.

"No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter.

"(b) Due date.

"All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year, and in the latter case it shall be reckoned proportionately, from the 1st day of the month in which the liability to a special tax commenced, to and including the 30th day of June following."

This statutory provision has been administratively clarified by the Bureau of Internal Revenue in an amendment to its Regulation 132 which now provides in pertinent part as follows (26 C.F.R. (1954 Supp.))

"Sec. 325.50. *Registry, return and payment of tax.*

"(a) No person shall engage in the business of accepting wagers subject to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24) until he has filed a return on Form 11-C and paid the special tax imposed by section 3290. Likewise, no person shall engage in receiving wagers for or on behalf of any person engaged in such business until he has filed a return on Form 11-C and paid the special tax imposed by section 3290 of the Internal Revenue Code. • • •"

tax data which was held constitutionally valid in *United States* v. *Kahriger, supra.*

2. Petitioner also contends (Pet. pp. 20-22) that certain provisions of the revenue laws (26 U. S. C. 3273, 3293) requiring taxpayers to post special stamps in their place of business showing payment of the tax, and a provision (26 U. S. C. 3275) requiring each collector to maintain a public list of such taxpayers, violate his right against unreasonable searches and seizures under the Fourth Amendment. It is argued that such information would put the local United States Attorney on notice of petitioner's possible criminal activities and would lay a foundation for the issuance of a search warrant. Since the posting and filing are clearly not an actual search, and since a search under a warrant based on probable cause would not be a violation of the Fourth Amendment, the entire argument is merely an attempt to clothe in other terms petitioner's basic and untenable position that a tax on an illegal business is unconstitutional.

As a practical matter, it is apparent that compliance with the registration requirements sustained as constitutional in *United States* v. *Kahriger, supra*, would furnish public officials with any information which might be obtained from the posting requirement. Furthermore, there is no constitutional objection to requirements validly implementing collection of the revenue, such as these. *United States* v. *Kahriger, supra* (345 U. S. at pp. 31-32). The provisions requiring that the special stamp be posted by the taxpayer are analogous to

legislative provisions which require the keeping of records " * * * in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." *Shapiro* v. *United States*, 335 U.S. 1, 33. Such records are endowed with attributes of public records and do not possess the same protection of the Fourth Amendment as do private papers. *Shapiro* v. *United States, supra; Davis* v. *United States*, 328 U. S. 582, 589-590; *Wilson* v. *United States*, 221 U. S. 361, 380; *Boyd* v. *United States*, 116 U. S. 616, 623-624. Cf. Meltzer, *Required Records, the McCarran Act, and the Privilege against Self-Incrimination*, 18 U. of Chi. L.R. 687, 715-719.

CONCLUSION

The decision below is clearly sustained by the recent opinion of this Court in *United States* v. *Kahriger, supra.* It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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